Nos. 80-11 and 80-15

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

J. GREGORY MERRION, *et al.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*,
Respondents.

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the States of New Mexico, North Dakota and Utah in support of the Petitions for Certiorari pending in this Court in the above-referenced causes. These cases involve issues of vital

importance to the Amici States which we urge the Court to review.

The States of New Mexico, North Dakota and Utah include large areas of land set aside for Indian reservations which contain substantial reserves of oil and gas, coal and other natural resources. Extraction of these resources by non-Indian producers has been taxed by Amici States for nearly half a century since such taxation was first authorized by Congress in the Act of March 3, 1927, 25 U.S.C. §§ 398(a)-(e).

SUMMARY OF ARGUMENT

The decision of the Tenth Circuit, if allowed to stand, will undermine the congressional scheme embodied in 25 U.S.C. §§ 398(a)-(e) and create grave consequences for the taxing schemes of Amici States as well as for the consumers of natural resources.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit involved in these cases threatens to frustrate the tax scheme of Amici States with respect to the severance of these natural resources by completely undermining the congressional policy expressed in the Act of March 3, 1927, 25 U.S.C. §§ 398(a)-(e), to divide the benefits of oil and gas severance on Executive Order Indian reservations between the States and the Tribes by allocating to the States the power to tax the entire output of oil and gas production on such lands while granting to the Tribes the rental, royalty and bonus incomes from this production.

This judicial undoing of a decades-old congressional policy poses potentially disastrous consequences for the Amici States. Indeed, it is in accordance with the benefit allocation scheme expressed in 25 U.S.C. §§ 398(a)-(e)

that these States have adopted a tax policy which seeks to derive maximum revenue consistent with maintaining maximum oil and gas production from all producing leases including marginal wells. By permitting the additional burden of Indian taxation on the severance of these resources contrary to 25 U.S.C. §§ 398(a)(-(e), the decision of the Tenth Circuit will occasion a reduction in oil and gas production from marginal wells, discourage exploration in all but proven areas, and inevitably reduce the amount of production against which state tax rates may be applied. It will also impede the ability of the Amici States to increase the severance taxes which the Congress has given them the statutory right to impose without restriction. The potentially disastrous revenue consequences for the Amici States resulting from this decision are thus apparent. In this connection it should be remembered that while state tax policy is set by legislatures which include representatives elected wholly or in part by reservation Indians, Indian tax policy is established by tribal councils elected only by tribal members to the exclusion of other citizens of the Amici States. Under these circumstances, it is highly doubtful that Indian tax policy with reference to oil and gas severance will be coordinated with state tax objectives.

Moreover, while the decision of the Tenth Circuit diminishes the benefits allocated to the States by this federal statutory scheme, it leaves the other side of the benefit allocation ledger unchanged. The Tribes remain free to collect the rental, royalty and bonus incomes from oil and gas production without interference and without sharing. This imbalance cannot reasonably be said to be consistent with the congressional intent in enacting 25 U.S.C. §§ 398(a)-(e).

Finally, the impairment of state tax policy by the decision of the Tenth Circuit threatens to impose unwel-

come consequences on the citizens of the Amici States as well. For example, it will disrupt the use of severance tax funds for the construction of permanent public facilities and other public improvements which are available to all the citizens of the State of New Mexico. Secondly, since 20% of oil and gas production from the Jicarilla Reservation is utilized intrastate, an increase in the cost of production by virtue of an Indian severance tax will result in an increase in the cost of energy to New Mexico consumers. These increases would be made without the protection of public debate or regulatory review. Similar consequences will undoubtedly be visited upon the citizens in the other Amici States as other Tribes take advantage of the ruling.

CONCLUSION

For the foregoing reasons—coupled with the reasons set forth by Petitioners—Amici States respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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